2001

# State of Utah v. Ryan D. Nelson : Reply Brief

Utah Court of Appeals

**IN THE UTAH COURT OF APPEALS**

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| STATE OF UTAH,<br><br>Plaintiff/Appellee,<br><br>vs.<br><br>RYAN D. NELSON,<br><br>Defendant/Appellant. | Case No. 20010753-CA |

# REPLY BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION OF FORCIBLE SODOMY, A FIRST DEGREE FELONY, BEFORE THE HONORABLE GARY D. STOTT

**BRETT J. DELPORTO (6862)**
Assistant Attorney General
**MARK SHURTLEFF (4666)**
Utah Attorney General
**APPEALS DIVISION**
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, Utah 84114

Counsel for Appellee

**MICHAEL D. ESPLIN (1009)**
**MARGARET P. LINDSAY (6766)**
Aldrich, Nelson, Weight & Esplin
43 East 200 North
P.O. Box "L"
Provo Utah, 84603-0200
Telephone: (801) 373-4912

Counsel for Appellant

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## ARGUMENT

### I. THE RECORD IS CLEAR THAT NELSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

#### A. Trial Counsel Was Ineffective for Failing to Call Two Critical Alibi Witnesses

The State first claims that Nelson was not prejudiced by his trial counsel's failure to file a notice of alibi witness since the alibi witnesses that would have testified in Nelson's behalf "could not account for defendant's whereabouts on the Afternoon August 3, 2001 – the day and time the crime was alleged to have occurred" (Br. of App. at 7, 9-10). Nelson asserts that the record in this case is straightforward and clear – alibi witnesses were ready and willing to testify on Nelson's behalf, but trial counsel failed to file a notice of alibi. But for this failure, a more favorable outcome was likely.

The State's first claim, that the alleged incident occurred on August 3, 2000, is incorrect. Although the State misleadingly states in its Statement Of The Case that the

Information alleges that the incident occurred "on August 3 or 4, 2000" (Br. of App. at 2), the Information clearly states that the alleged crime occurred "on or about August 04, 2000" (R. 1). And though it appears that the State claims that the victim testified that the alleged incident occurred on August 3, 2000 (Br. of App. at 5, citing R. 164 at 79), the victim was not sure what date the alleged incident occurred (R. 164 at 85, 96). The record is clear that the State believed the incident occurred on August 4, 2000: the prosecutor told the jury during opening statements that the alleged incident occurred "on or about August 4 of the year 2000" (R. 164 at 66); the prosecutor then explained to the jury during closing argument that it did not matter whether it occurred on the 3rd, 4th, or 5th since "we don't have to establish the necessary day" considering the "on or about" instruction (R. 164 at 161, 173); and the jury instruction alleged the incident occurred "on or about August 4, 2000" (R. 111).

Moreover, at the evidentiary hearing pursuant to Rule 23B, the trial court found specifically that the "testimony of both Steven Bagley and Chelsee Nelson was relevant to the issues presented at trial and to the defense presented by the defendant" (R. 216). Both were willing and able to provide alibi testimony on Nelson's behalf (R. 216).

Thus, the State's claim that the assault could have only occurred on August 3, 2000, is not supported by the record. The record shows that after the jury heard all testimony, even the prosecutor was not sure what day the alleged event supposedly happened (R. 164 at 161, 173). More importantly, the trial court on remand found that the alibi testimony was "relevant" and that trial counsel failed to take the necessary steps

to comply with Utah Code Annotated § 77-14-2 so that these witnesses could testify in Nelson's behalf (R. 111).

Because the record clearly shows that the assault occurred on or about August 4, 2000, Nelson's trial counsel's performance was deficient for failing to ensure that Stephen Bagley and Chelsee Nelson were able to testify in Nelson's behalf even though both were present at the trial, ready and willing to testify. But for this deficient performance, the outcome would have been different.

## B. Nelson's Trial Counsel Was Ineffective for Failing to Object to Hearsay Testimony.

The State next claims that trial counsel's performance was not deficient for failing to object to hearsay testimony because "a hearsay objection would have been improper because none of Ms. Allred's testimony was hearsay" (Br. of App. at 12-13). Nelson asserts that his trial counsel failed to object to hearsay statements made by Ranae Allred and Officer Sorensen (Br. of Aplt. at 33). The State cites to *State v. Speer*, 718 P.2d 383 (Utah 1986), to support its claim. However, *Speer* is not analogous to this case.

In *Speer*, the child victim testified against the defendant. 718 P.2d at 384. During cross-examination, the defense attempted to undermine the child's credibility by "bringing out inconsistencies between her in-court testimony and her testimony at the preliminary hearing." *Id.* The child admitted on the stand that "at the preliminary hearing, she had said that she made up part of the story" regarding the sexual abuse

crime. *Id.* The child testified that she could not remember what part of the story was made up, but that the story she told in-court was true. *Id.*

Over defense counsel's objection, the trial court permitted the victim's mother and two officers who investigated the matter testify as to what the child told them, and the trial court informed the jury that this testimony was "admitted for the sole purpose of rehabilitating the victim's credibility." *Speer*, 718 P.2d at 385. The Utah Supreme Court upheld the trial court's ruling, because the "statements admitted in this case to establish that the child had told a story prior to the preliminary hearing consistent with her testimony at trial were clearly not hearsay under Rule 801 and were properly admitted." *Id.*

As opposed to Speer, where the child admitted on the stand that she had previously lied about part of her story implicating the defendant, Allred never testified that he lied nor was any of his testimony effectively contradicted during cross-examination; therefore, there was no need for rehabilitative testimony. The trial court allowed the additional testimony in Speer because it appeared that the child had made part of her story up and she was unsure which part of the story was true or false. See *Speer*, 718 P.2d at 384-85. The trial court admitted prior statements for the sole purpose to show that the victim had given prior consistent statements regarding the alleged offense. *Id.*

In this case, the testimony of Ranae Allred and Officer Sorensen was admitted, not to show that Allred's statements were consistent, but to prove the truth of the matter

asserted. The trial court gave no instruction to the jury that these statements were offered only for rehabilitative purposes, as the trial court did in *Speer*.

The State further claims that Officer Sorensen's statements were "offered merely to explain why and how he conducted an interview with a defendant" (Br. of App. at 15). However, the record clearly shows that Officer Sorensen was not asked in the context of explaining "why the officer took the investigative steps that he did." (Br. of App. at 15, quoting *State v. Bryant*, 965 P.2d 539, 547 (Utah App. 1998)). The prosecutor simply asked Officer Sorensen "where was the incident reported to you of as having taking place" in order to bolster Allred's testimony (R. 164 at 117). If the question was asked in a manner to allow Officer Sorensen to explain why he took the steps he did, the prosecutor would have asked the officer questions such as, "why he did not take the victim to the hospital the night of the crime; why detectives later called for the cashbox to be fingerprinted; and why the victim's clothes were in their present state;" or rather "what led you to believe Nelson was involved?" *See Bryant*, 965 P.2d at 547. Instead of asking a question that would show why Officer Sorensen took the necessary investigative steps that he did, the prosecutor waited essentially until the very last question on direct examination and only asked where the incident reportedly took place (R. 164 at 117). Thus, the record is clear that this question was asked, not to show investigative steps, but for the truth of the matter asserted.

### C. Elicitation of Otherwise Inadmissible Prior Bad Acts Was Ineffective

The State further claims that introduction of evidence regarding Nelson's prior theft conviction, prior drug conviction, and prior DUI conviction was "either inadvertent, based on a reasonable trial strategy or harmless" (Br. of App. at 16). Nelson asserts that there could be no reasonable trial strategy to introduce this prior bad acts evidence, especially considering that the Utah Rules of Evidence are specifically designed to limit prior bad acts evidence, since "[t]he admission of evidence of prior crimes may have such a powerful tendency to mislead the finder of fact as to subvert the constitutional principle that a defendant may be convicted only if guilty beyond a reasonable doubt of a specific crime charged." *State v. Saunders*, 1999 UT 59, ¶ 15, 992 P.2d 551.

The State claims that Nelson "simply volunteered more than he was asked" regarding the theft conviction (Br. of App. at 19). A close look at the record reveals otherwise. Trial counsel asked Nelson why he initially went to meet with Officer Sorensen (R. 164 at 144-45). Nelson could have lied and made up a story in order to avoid letting the jury know that he was meeting with Officer Nelson to discuss another charge, but instead Nelson told the truth (R. 164 at 145). It is clear that Nelson's trial counsel either did not know why Nelson initially met with Officer Sorensen or he was careless and forced Nelson to admit that he was meeting with Officer Sorensen to discuss a different charge.

Regarding the drug conviction, the State claims that introducing this to the jury was reasonable trial strategy "[r]ather than waiting for this evidence to come in on cross-examination" (Br of App. at 24). Nelson asserts that the State is aware that this evidence would have been inadmissible but for trial counsel's deficient performance in eliciting

this information. Moreover, it is absurd to assume that trial counsel's attempt to paint Nelson as a normal person with problems just like everyone else would include divulging to the jury the fact that he had drug and alcohol as well as theft convictions. There is simply no justification for introducing such facts to the jury and trial counsel's performance could be nothing but deficient.

Additionally, this evidence certainly harmed Nelson because it called the jurors' attention to matters not proper for their consideration, namely that he had a criminal history of theft, drugs, and alcohol; otherwise a person of low moral character.

There was no reason for the jury to hear and consider this evidence and Nelson's trial counsel clearly performed below an objective reasonable standard by opening the door to and introducing this evidence.

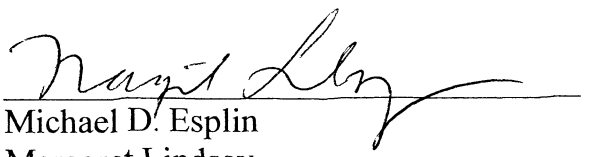
## II. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING TWO ALIBI WITNESSES AND THE TRIAL COURT ERRED BY ALLOWING HEARSAY TESTIMONY

The State finally claims that the trial court's evidentiary rulings "were correct and not an abuse of discretion." (Br. of App. at 26). For the reasons stated in this brief and the original brief, Nelson asserts that the record clearly indicates that the trial court abused its discretion by excluding two alibi witnesses that were ready and willing to testify and that the trial court erred by allowing hearsay testimony that impermissibly bolstered the alleged victim's testimony.

## CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the original brief, Nelson asks this Court to reverse his conviction of forcible sodomy.

RESPECTFULLY SUBMITTED this 29th day of April, 2004.



Michael D. Esplin
Margaret Lindsay
Counsel for Appellant

## CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 29th day of April, 2004.